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AUTHOR Harper, Patricia
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ABSTRACT

This paper examines changing family patterns in Australia over the last twenty-five years, and proposed or actual legislative changes which have occurred in this area. Statistics are presented which reflect the changing nature and structures of Australian families for the following categories: married families; one-parent families; de- facto (informal marriage) families; births; adoptions; stepchildren and stepfamilies; children in foster families; and artificial insemination by donor (AID) and in vitro fertilization (IVF) families. A summary of legislative changes in Australia over the past twenty-five years is presented for these topics: marriage and divorce; the status and rights of ex-nuptial children and their parents; adoption (issues highlighted in this category include access to birth records, consents required for adoption, and guardianship as a legal alternative to adoption); stepfamilies; children in long-term foster families; and families with AID and IVF children. (WAS)

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Discussion Paper Number 9

CHANGING LAWS FOR CHANGING FAMILIES

Patricia Harper

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Introduction

The past twenty-five years, from the late 1950s to the early 1980s, have probably seen more significant changes occurring with respect to Australian families than the previous 100 years. There have been major changes in family formation and breakdown; in family structures; the status, rights and obligations of family members — and in the legislation governing these matters.

Changes affecting families and family members have occurred in a number of key areas, and this paper examines briefly:

1 Changing family patterns

2 The legislative changes which have occurred, or have been proposed.

It looks in particular at the following areas:

- Marriage and divorce
- The family relationships, status and rights of children and parents where the parents are not married to each other
- Families based on adoption
- Stepfamilies
- Children in long-term foster families
- Families with children conceived as a result of artificial insemination by donor (AID) or of in vitro fertilisation (IVF).

Over the last 20 years major legislative initiatives have been taken, or proposed, in each of these areas. Two basic themes underlie these initiatives:

- The importance of the law being responsive to the changing needs of families and family members
- The need for uniformity throughout Australia of legislation affecting families and family members.

The then Commonwealth Attorney-General, Garfield Barwick, referred to the importance of these two themes in 1961, when he wrote of the *Marriage Act* 1961:

> I do not believe that there is any necessary virtue in uniformity . . . but the relationship of husband and wife, parent and child, is common to us all, whether we derive from one State or another . . .
>
> . . . To bring unity to the marriage law of Australia was not, however, the main task of the architects of the *Marriage Act*. Their main task was to produce a marriage code suitable to present day Australian needs, a code which, on the one hand, paid proper regard to the antiquity and foundations of marriage as an institution, but which, on the other, resolved modern problems in a modern way.

These themes also lay behind the introduction of the uniform *Adoption Acts* 1964-1968, the Status of Children legislation of the 1970s, and the proposed legislation of the 1980s providing for the legal status of AID and IVF children.

Changes in these last three areas differed, however, because they were not matters for which the Commonwealth Government had constitutional responsibility. Thus it required the various State, Territory and Commonwealth governments to reach agreement before uniform legislation could be achieved affecting these families throughout Australia.

In examining the changing needs of Australian families, and the ways in which the legal relationships, rights and status of family members vary according to whether they happen to be a Commonwealth or State responsibility, it is important that we ask ourselves the following questions:

- Is it appropriate any longer that the responsibility for enacting legislation affecting families and family members be divided between the Commonwealth and the States?
- Should the appropriate steps be taken to give the Commonwealth government the power to legislate with respect to the status and rights of all Australian children and their families?

Changing Family Patterns

Let us look first at the changing nature and structures of families in Australia as reflected in the statistics.

Married Families

In the late 1960s, marriages averaged 106 000 per annum; by 1981, the number had risen only slightly to 113 905. Divorces, over the same period, trebled from an average of 10 738 per annum in the late 1960s to 41 412 in 1981, an increase from 1.0 per 1000 population in 1971 to 2.8 per 1000 in 1981.

The average length of marriage has fallen from 13.9 to 10.2 years. The proportion of marriages ending in the first 5 years has risen from 7.9 per cent to 20.8 per cent, and the proportion of marriages involving a previously married partner or partners has increased from 10.3 per cent to 34.3 per cent.

Couples have increasingly delayed both getting married and having children. In 1971, 25.7 per cent of men and 11.6 per cent of women in the 25-29 year age group had never married; by 1981, this had risen to 36.5 per cent for men and 20.5 per cent for women. The figures also indicate an increasing tendency for married women to delay having children. In 1971 the first child was born after a median of 1.6 years of marriage; in 1981, the median delay had increased to 2.3 years. In addition, there has been a reduction in the number of children in families, with the proportion of married women having 3 or more children falling from 13.2 per cent in 1971 to 8.4 per cent in 1981.

One-parent families

The number of one-parent families has more than doubled from 130 600 in 1969 to 282 200 in 1981. Thus, in 1981, 12.9 per cent of families with

children were one-parent families, of whom approximately 85 per cent were female-headed.

De facto families

Significant changes have occurred not only with respect to families based on marriage, but also with respect to families based on informal marriage, or de facto relationships. No accurate figures exist, but estimates (based on Census figures) contained in the NSW Law Reform Commission's Issues Paper, 'De Facto Relationships' (1982), show a significant increase in such families, from around 17 083 in 1971 (0.67 per cent of all families with spouses) to 65 938 (2.2 per cent) in 1976.

It is expected that the number and proportion of such families will have continued to rise since 1976.

Births

The total number of births in Australia has fallen from an average of 240 000 per year in the late 1960s to 235 842 in 1981. As a proportion of total births, ex-nuptial births have increased both in numbers, from 19 000 in the late 1960s, to 31 200, and proportionally from 7.9 per cent to 13.2 per cent. This is mainly due to the large decline in nuptial births. The proportion of these ex-nuptial children placed for adoption (the traditional source of babies for adoption) has fallen from around 30-40 per cent in the late 1960s to around 5 per cent now, causing a dramatic decline in the number of babies available for adoption.

Adoptions

Total adoptions in Australia have halved from 6773 in 1969 to 3337 in 1980. This decline in numbers is even more dramatic with respect to non-relative adoptions (i.e. traditional baby adoptions). Unfortunately, Australia-wide statistics are not available, and hence the trend must be illustrated by State figures. In 1969, in New South Wales and Queensland, approximately 82 per cent of adoptions were non-relative adoptions (i.e. 2619 of a total 3163 adoptions); by 1980 they constituted only 51.1 per cent of all adoptions (1700 children). In 1969, in those two States, only 11 per cent of adoptions were by step-parents; by 1980, step-parent adoptions constituted almost half of all Australian adoptions (47 per cent or 1564 children).

The dramatic changes in adoption figures are also illustrated in the Victorian and Tasmanian statistics. In Victoria, total adoptions fell from 2057 in 1971

to 914 in 1980, with non-relative adoptions plummeting from around 1480 in 1972 (84 per cent) to 390 in 1980 (43 per cent), while step-parent adoptions rose from 270 in 1972 (15 per cent) to 514 in 1980 (56 per cent). The trends illustrated by these statistics from the Department of Community Welfare Services and the Australian Bureau of Statistics, are set out in the following table.

Adoptions Victoria

	Non-relative	Step-Parent	Total
1972	ca 1480 (84%)	270 (15%)	1768
1980	390 (43%)	514 (56%)	914

In Tasmania, total adoptions fell from 348 in 1969 to 148 in 1980. Of the latter, 90 were non-relative adoptions and 54 were step-parent adoptions.

Stepchildren and stepfamilies

No figures are available concerning the number of children in families where one or both of the partners has children from a previous marriage or relationship, i.e. stepchildren.

However, given the increase in the number of divorces and remarriages in the past decade, it is clear that the number of stepchildren will have risen significantly since the end of the 1960s.

While statistics are not kept on the number of stepfamilies or stepchildren, it is possible to estimate a figure representing the minimum number of children likely to move into a stepfamily in one year. We know the number of marriages per annum (113905 in 1981); that over 1 in 3 marriages involve partners where either one or both partners has been previously married; that 60 per cent of divorces involve children; and that there is an average of 2 children per divorce involving children. It should be noted that there is an additional group of stepchildren resulting from bringing into a marriage children from a previous non-marital relationship. There is no way of estimating the size of this group, but we do know the annual number of ex-nuptial births: 28076 in 1981. A further unknown factor is the re-

marriage rate of parents *with children* — is this equal to, or less than, the overall rate of marriages involving a previously married partner, which is 1 in 3? Starting from the assumption that it is more difficult for parents with children to remarry, and if we make a further assumption that no less than a minimum of 15 per cent of marriages involve a partner with children, this would mean that in 1981, approximately 17000 marriages involved a partner with children. Given that these partners will have an average of 2 children each, this gives us a possible 34000 children becoming step-children in 1981.

Children in foster families

At the end of June 1981, 10236 children were living apart from their own families in the care of foster families. It is difficult, however, to determine the trends in foster placements over recent years because of the inadequacy of available statistics. It is equally difficult to determine the duration of foster placements, although it is clear that many children have been in the care of their foster families for many years.

AID and IVF families

To add to the complexity of the changing Australian scene, programs enabling the birth of children following artificial insemination by donor (AID) were established and expanded rapidly in the late 1970s as the number of children available for adoption fell. Although accurate figures are not kept, it is known that several thousand AID children, who legally have the status of ex-nuptial children, have been born and are being raised in Australian families. In addition, several dozen children have been born as a result of in vitro fertilisation (IVF) programs.

Legislative changes

Marriage and divorce legislation

Significant changes in this area first appeared in the late 1950s and early 1960s. The *Marriage Act* 1961 replaced nine separate and diverse systems of State and Territory marriage law with one Federal marriage law, whilst the Federal *Matrimonial Causes Act* 1959-1966 provided for the Commonwealth government (rather than the individual States) to regulate the processes of separation and divorce in Australia, and invested State and Territory Supreme Courts with Federal jurisdiction in matrimonial causes.

In 1976, more significant changes occurred in this area. The *Family Law Act* 1975 took effect, whereby the sole grounds for divorce became the irretrievable breakdown of the marriage based on twelve months separation. This replaced the fault system of divorce where the grounds included adultery, desertion, cruelty, habitual drunkenness, failure to pay maintenance, and five years separation. In so doing, it removed much of the distress and bitternesss from the divorce process (although some argue that this has been transferred to the battles over children and property). The *Family Law Act* also established a specialist and helping court, the Family Court of Australia, to deal with marriage breakdown and divorce.

The Family Court is a multi-disciplinary court, in which counselling has become an integral part of the services offered by the court. The Act also set up the Family Law Council to monitor the progress of the *Family Law Act* and of the Family Court, and to advise the Federal Attorney-General of any changes required. Finally, the Act provided for the establishment of the Institute of Family Studies to identify, and develop understanding of, the factors affecting marital and family stability in Australia.

A major review of the *Family Law Act* was carried out in 1978-1980, by a Joint Select Committee of the Federal Parliament. Following the Report of

the Committee, and a report and recommendations from the Family Law Council, in 1981 the Federal Attorney-General introduced major amendments to the *Family Law Act*. These amendments have yet to be debated in parliament.

It can be seen, therefore, that the legislation with respect to marriage and divorce is not only uniform throughout Australia, but has been drawn up so as to encourage ongoing review of the responsiveness and adequacy of the legislation in the light of changing family patterns and needs. It could indeed be accurately described as a changing law for changing families.

Status and rights of ex-nuptial children and their parents

An area of law that, until the 1970s, had remained basically unchanged for centuries, and had not responded to the needs of the children and families concerned, was that relating to both ex-nuptial children and de facto families. Traditionally, an ex-nuptial child has been regarded as *filius nullius* (the child of no-one) and suffered gross discrimination in law and from the community. In the mid 1970s, all Australian States, except for Western Australia, enacted specific legislation removing the status of illegitimacy and providing that the parent-child relationship should be determined regardless of whether the parents are married to each other or not. This legislation also provided grounds for establishing paternity and for the child to inherit from both parents. However, these Acts, except in South Australia, did not establish both parents as joint custodians and guardians of the ex-nuptial child. Recent court decisions, though, have stated that the legislation should be interpreted in this way to designate both parents as guardians and custodians.

The South Australian *Family Relationships Act* not only provided for both the mother and the father of an ex-nuptial child to have joint guardianship and custody with respect to the child, but also amended the South Australian *Adoption Act* to require the consent of the father of an ex-nuptial child to his child's adoption. No other State has so legislated, although, if recent decisions of the courts are upheld that the father is a guardian of the child along with the mother, they may change the provisions of State adoption acts regarding consents required for an adoption.

Additional changes are still required in this area to ensure that the needs of ex-nuptial children and their families are met. If four of the States proceed to 'refer' to the Commonwealth their powers with respect to these children, most of the discrimination will be removed, and uniformity in law with

respect to the parent-child relationship as between nuptial and ex-nuptial children, and as between the various States and Territories, will have been achieved almost completely. When this occurs, both parents of an ex-nuptial child will be guardians and custodians of the child, and the law will be seen to have become more responsive to the needs of these families.

Legislation covering other aspects of de facto families has not, however, kept pace with changing family patterns. Although increasing numbers of couples are choosing to live together without marriage, little protection is afforded them by the law, especially for women. Such provisions as do exist vary, both according to the State in which the family lives, and according to the particular legislation involved.

The New South Wales Law Reform Commission under Professor Ronald Sackville, in cooperation with the Family Law Council, is presently carrying out the most extensive inquiry to date as to the rights and obligations of individuals in de facto families and as to the degree to which the law should cover (or protect) them. It is hoped that the recommendations for legislative change which are likely to arise out of the Commission's report, if implemented by the New South Wales and other State Governments, will ensure that the law in this area is finally responding to the needs of these families and their members.

Adoption — the need for legislative change

Since the introduction of the uniform *Adoption Acts* of the 1960s, the adoption scene has changed radically. The focus then was on the adoption of healthy new-born babies, almost all of whom were ex-nuptial children. Little or no attention was given to children with special needs, children in long-term care, inter-country and cross-cultural adoption, the needs of AID and IVF children, or to questions such as access to information concerning origins or supports for the natural family. Indeed the main problem at that time was to find enough adoptive parents for the children available for adoption.

By the late 1970s, not only had the numbers and nature of adoptions changed, but also there was increasing pressure for changes to adoption legislation to make it more responsive to the needs of the families and individuals involved. Such pressures have come about as a result of several developments — the growth of organisations of natural parents (such as the National Council for the Single Mother and her Child), of adopted persons (such as Jigsaw and Adoption Triangle) and of adoptive parents; the 1976

and 1978 Australian Conferences on Adoption; the reports and recommendations of advisory committees such as those in New South Wales, South Australia and Victoria; and the pressures exerted by Standing Committees on Adoption in some States.

The impetus for change has focused particularly on several important issues in adoption law, which have been the subject of debate in most of the States, and which I would like to examine briefly. While much of the discussion relates to Victoria (where the impetus for change has been greatest) and the work of the Victorian Adoption Legislation Review Committee (ALRC), it is equally relevant to the other States.

Access to birth records

Adoption legislation in all States forbids adoptees the right of access to birth records without a court order.

Pressure from natural parents, adoptees and other interested persons has led to initiatives being taken in recent years to bring about changes. This pressure resulted from

- the needs of adoptees to establish a sense of self-identity by gaining access to their birth records (a basic human right for the rest of the community) and thus to information about their natural parents and their genealogical origins
- the needs of natural parents to know of, and be reassured as to, the well-being and future of the child they gave for adoption
- the evidence of research overseas, especially that of Dr John Triseliotis, and the experience of Scotland and Finland over the past 50 years, along with that of adoptees in England following the opening up of birth records as a result of the United Kingdom *Children Act* 1975.

This evidence weighs overwhelmingly in favour of unrestricted access by adult adopted persons to their birth records. In New South Wales in 1976 and in South Australia in 1977, contact registers were established to enable adoptees and natural parents to register their names with a view to a match occurring and contact being made. These contact registers have disadvantages, however: very few contacts actually occur and, in New South Wales, the requirement that the adoptive parents must consent to any contact being made holds the seeds for potential disruption to the relationship between the adoptee seeking contact and his or her adoptive parents.

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In Victoria, the ferment for change has been greater than in any other State. The Statute Law Revision Committee (SLRC) of the Victorian Parliament conducted an inquiry, including public hearings, into this question. It received a wide range of submissions including evidence of research findings. The SLRC rejected these research findings and much of the public evidence, and recommended:

- That there should be no change in the access provisions affecting persons already adopted
- That access should be permitted for prospective adoptions only if the natural parents first consented.

In doing so, the SLRC likened adoption to a contract which should not be broken without the agreement of the original parties. Yet insofar as this has legal overtones, it is most inappropriate to describe a complicated and delicate change in human relationships in terms of an inflexible commercial contract or bargain which must be enforced by law, a contract, moreover, into which some families may not have entered voluntarily, and to which the adopted child did not consent.

A second report in 1980 to the Victorian Government by its own expert advisory body, the Adoption Legislation Review Committee (ALRC), strongly criticised the earlier SLRC Report and Recommendations on the grounds of the poor standard of reasoning given, and the weakness in procedures and methodology used by the SLRC. The ALRC unanimously recommended that the law should be changed to allow all adult adopted persons the right of access, from age 18, to a copy of their birth certificate in a counselling situation. The ALRC also recommended establishing an Adoption Information Service to facilitate the exchange of information between all persons with any link into the adoption triangle.

In 1980, the Victorian Adoption of Children (Information) Bill was introduced which ignored the recommendations of its own expert committee, the ALRC, and implemented the provisions of the SLRC report. The community outcry opposing these amendments was so strong that the Government agreed to proceed only with those provisions of the Bill relating to establishing a Contact Register and Adoption Information Service. It agreed that the remaining provisions should not be proclaimed until the ALRC had held public hearings and submitted its final report.

It would appear that, apart from the fears of a few members of the community (including some members of parliament), there is overwhelming support for the ALRC recommendations as to access to birth records. It remains to be seen how soon further legislative changes will be introduced to permit access by adult adoptees to a copy of their birth certificate.

Consents required for adoption

The adoption acts of all States, except South Australia, exclude the natural father of ex-nuptial children from formally participating in the adoption process, by providing that the consent only of the natural mother or guardian is required. An unreported Victorian Supreme Court decision, *L v B and another* 1976, held that the natural father is not a guardian for the purposes of Victorian adoption legislation. Given the wishes of many natural fathers to be involved in this process, it is clear that the needs of both parents and children are being neglected by the law.

South Australia sought to remedy this discrimination in 1975 when, along with the introduction of the *Family Relationship Act*, an amendment to the South Australian *Adoption Act* provided that the consent of the natural father to the adoption of his ex-nuptial child was required provided that paternity was, or was about to be, established in accordance with the Act.

In New South Wales, changes in the law, passed through Parliament in 1980, have not yet been proclaimed.[1] If the father actually has a custody order in his favour, his consent to adoption is required unless an order is made dispensing with his consent. In some other situations, the natural father may be notified that his child is being placed for adoption and given 14 days to apply for a different order for the care of his child. It is understood that this legislation will be proclaimed in 1983.

The ALRC in Victoria has given close consideration to this issue, and has followed the broader provisions of the South Australian Act, rather than the narrow and discriminatory provisions of the New South Wales Act. In its first Working Paper, the ALRC has proposed that the consent of the natural father should be required where paternity is, or can be, established, and that agencies should have a duty to inform the natural father of the proposed adoptive placement of his child.

[1] *Adoption of Children (Amendment) Act*, 1980 (NSW).

Given the importance of the need to abolish discrimination against persons whose parents are not married to each other, and of promoting personal responsibility in personal relationships regardless of whether or not they are based on marriage, it is important that the law responds to such needs and is changed in accordance with ALRC recommendations.

Nature of the court handling adoption matters

All States have different provisions in this respect, but adoption has remained in the traditional court setting, except in Western Australia where adoptions are dealt with by the Family Court of Western Australia. The Western Australian legislation recognises, as did the *Family Law Act*, that matters dealing with human relationships are best dealt with by a specialist court. Such a court should: have helping services; have judges with experience and expertise in such matters; be able to deal with the whole range of family matters, including adoption, without the need to jump from court to court depending on the legislation (Federal or State) involved; provide for separate representation of the child; and seek to minimise the adversary process.

The Victorian ALRC recognised the logic of such reasoning and proposed in its second Working Paper that adoption matters, as in Western Australia, should be dealt with by a family court. It is interesting to note that New South Wales has chosen to continue to keep adoption separate from other family matters by amending the New South Wales *Adoption Act* to establish an Adoption Tribunal. This Tribunal would consist of Supreme Court judges as President and Deputy President, along with members of the medical and social work professions and other persons thought to have suitable qualifications or expertise. These changes may not be as far-reaching as they initially appear, because all straight-forward uncontested applications for an adoption order will be dealt with by one of the two judges. Other matters will be dealt with by the full Tribunal, but should a legal problem arise concerning interpretation of the Act, it will be for the judicial members to decide the matter. These provisions of the New South Wales Act also have not yet been proclaimed and it remains to be seen whether the proposed Tribunal will meet the needs of the families concerned in the same way as the Family Court in Western Australia.

Guardianship or custody as a legal alternative to adoption

Since the mid-1970s, increasing attention has been focused on the need for adoption law to be more responsive to the needs of children, and in particu-

lar, children who already have knowledge of their natural parents and family, and who may still have ongoing contact with some family members, but who need the security which current forms of care do not provide. Adoption no longer seems an appropriate form of care for many children because it involves permanently severing the original child-parent relationship, and, at least in its traditional form, has meant ending any relationship or contact between the child and members (or friends) of the natural family.

Many groups and individuals in the community now argue that the law of adoption, which was created primarily to deal with the placement of newly-born children, relinquished soon after birth, to unrelated adoptive parents, does not provide the best answer for these children. The two most significant groups of children in this category are:

- Stepchildren (increasing numbers of whom are being adopted in 'step-parent' adoptions)
- Children in long-term foster placements who have no prospect of being returned to the day-to-day care of their natural family.

Increasing support has been given to the proposal that new categories of care should be available (such as guardianship or custody) which lie between long-term foster care and adoption. It is envisaged that orders for custody or guardianship would maintain the legal and natural relationships between the child and the natural family, but would transfer some, if not all, parental rights and obligations to a new family within a legal framework which offers security to both the child and the care family. For example, the step-parent of a child might be given joint custody of the child along with the custodial parent, while the non-custodial parent might remain a guardian and have access to the child. Or a fosterparent who has cared for a child for many years might be given guardianship and custody of the child, while the natural parents are given access rights so as to enable continuing contact.

The United Kingdom *Children Act* 1975 and the *Adoption Act* 1976 provided for such alternatives by means of orders for either 'actual custody' (where an order has been made under the *Matrimonial Causes Act* 1973 with respect to the child) or 'custodianship' (where no previous order exists). Their provisions require the court to consider whether the interests of the child would be better served by the making of an order for 'custodianship' or for 'actual custody'.

Most Australian States and Territories are now examining the issues relating

to stepchildren, foster care and permanency planning. In Western Australia, following the completion of the Children in Limbo Study, continuing work is being done on the most appropriate forms of care to meet the needs of children who are 'in limbo', including that of a form of guardianship. In addition, at the Federal level, a sub-committee of the Family Law Council, known as the Watson Committee (chaired by Justice Watson of the Parramatta Family Court) has examined the meaning and substance of the terms *guardianship*, *custody* and *care and control* with a view to defining and clarifying these terms. This work was done with its initial focus on the use of these terms in the *Family Law Act* and the Family Court. However, as part of its work, the Watson Committee closely consulted with the State and Territory Welfare ministers and administrators with a view to trying to ensure uniform definition and usage of these terms and concepts in all relevant legislation, both Federal and State. The Family Law Council will further consult in early 1983 with a wide range of individuals and organisations with expertise and experience in these areas before making a final report to the Federal Attorney-General. It is hoped that the work of the Watson Committee will result in a more responsive and innovative legislative approach at State and Federal levels which will provide these children, and the families who care for them, with a more permanent and secure legal framework to meet their needs. Such a framework could be provided by the enactment of legislation empowering the courts to make a custody or guardianship order, depending on the individual circumstances and needs of each child and family.

Categories of care other than adoption would thus be created which would provide for the increasingly diverse needs of children and families. The various categories could then be known by either.

- The type of order made — custody, guardianship, adoption; or
- The generic term, adoption, then categorised by the particular order made — adoption (custody) order, adoption (guardianship) order, adoption (infant) order.

Legislative changes to introduce such additional categories of care can only benefit those children and families whose needs are not being met by existing adoption or foster care provisions.

Stepfamilies

The present legal situation concerning stepchildren is confusing in two respects.

First, the Family Court of Australia does not have the power to make decisions regarding the custody and guardianship of stepchildren following the 1976 High Court decision in *Russell v Russell*. Hence disputes concerning these matters are heard in State courts in accordance with State legislation which may differ substantially from the *Family Law Act*.

The Commonwealth is seeking to remedy this situation, and has introduced amendments[2] to the *Family Law Act* which provide that a stepchild will again be defined as a child of the marriage, as was the situation before the 1976 High Court decision. In any case, when the reference of power goes ahead, stepchildren will automatically come within the jurisdiction of the *Family Law Act*.

The second problem concerns the number of applications by step-parents to adopt their stepchildren into the new family. Almost half of all adoptions in Australia in 1980 (47 per cent) were step-parent adoptions. Attention has already been drawn to the inappropriateness of adoption in a number of respects. How much less appropriate will such arrangements be for children in stepfamilies? It is not in the child's interests that his new relationship with a step-parent should be established at the expense of severing his existing ties with his natural family.

As discussed previously, alternative forms of care clearly need to be introduced to enable a new legal relationship to be established between a child and his step-parent which would demonstrate the nature of the commitment by the step-parent to provide for the care, welfare and interests of the child, while enabling the child to maintain and develop his relationship with members of his natural family. Such legal alternatives would clearly define the legal rights and obligations of the families concerned, and could be established by the introduction of legislation, or amendments to existing legislation, empowering the relevant courts to make an order for *custody* or *guardianship*, on application by a step-parent, depending on the particular circumstances. If such provisions were to be established, the need for an adoption order with the consequent severing of legal ties and closing off of records would be neither necessary nor appropriate in stepfamily situations, while the child's knowledge of, and ties with, members of both his families would be strengthened.

Children in long-term foster families

The law providing for the legal status and family relationships of children in

[2] *Family Law (Amendment) Bill* 1980.

long-term foster care is most unsatisfactory, and varies from State to State.

At present, many of these children remain in a situation of legal limbo. The family providing for their day-to-day care has no legal security in the relationship established with the foster child, while the legal ties between the child and the natural family, which cannot care for the child on a permanent basis, generally remain. This can create a situation of considerable insecurity for all involved. What is needed, as with stepchildren, are legal alternatives which enable these children to maintain their relationship with members of their natural family, while at the same time providing for the transfer of some, if not all, parental rights and obligations to the foster family within a legal framework which offers security to both the child and the caring family.

As outlined in the earlier sections on adoption and stepchildren, the obvious solution lies in giving the relevant courts the power to make an order with respect to *custody* or *guardianship* in favour of the foster parents. Such an order could transfer some, if not all, parental rights and obligations to the care of foster parents, as is appropriate in terms of the welfare and interests of the child, while allowing flexibility with respect to the child's needs for a relationship with his natural family; e.g. provision could be made for access orders.

If the law were to be changed in this way so as to be more responsive to the needs of foster children for long-term security and care, the relationships of foster children with both their foster and natural families would be improved and stabilised, instead of being characterised by uncertainty and insecurity as at present.

Notwithstanding these proposals for reform of the laws, I suggest that the needs and interests of many children currently being cared for by families other than their own (e.g. by foster families) would best be met if existing practice in the field of family support and foster care were significantly improved, and substantial additional resources were provided to the natural families of these children so that they could care for their children themselves.

Families with AID and IVF children

It is only since the mid 1970s that, mainly as a result of the declining numbers of children available for adoption, increasing use has been made of AID procedures. With the increasing number of AID children being born,

pressure has been brought to bear on State and Federal governments to introduce legislation to clarify the status of AID children.

Under present law, an AID child is regarded as an ex-nuptial child. It is only because there is a legal presumption that a child born in marriage is the child of the husband and wife, and because of the falsification of birth registration forms, that most AID children are regarded as children of the marriage.

Steps are now being taken at both Federal and State levels to introduce legislation to clarify the status of AID — and now also IVF — children, by;

1 An amendment to the *Family Law Act*.[3] This amendment was introduced into Federal Parliament in late 1981. The amendment will expand the definition of a child of a marriage to cover an AID or IVF child. Such a change will 'deem' the child to be a child of the marriage 'for the purposes . . . of the (Family Law) Act'. However, unless reciprocal State legislation accompanies such amendments to the *Family Law Act*, these amendments will not necessarily be of assistance in other matters in other jurisdictions.

2 The introduction of State and Territory legislation. The States are proposing to legislate with respect to AID children. No legislation has yet been introduced by any State, although a model bill has been drafted with a view to its adoption by all States and Territories. It is anticipated that such State legislation, which will be quite simple, will 'deem' a child to be the child of the mother and her partner for all the purposes of the law of that State, provided the partner has consented to the insemination procedure. The legislation will provide that the donor would have none of the rights, duties or obligations of a father.

Legislative changes such as those outlined above approach the issues affecting AID and IVF children only from the narrow and legalistic perspective of status. No consideration has yet been given to the broader social impact and social policy implications of procedures enabling technologically-assisted pregnancies, whether AID, IVF, embryo transplants or surrogate motherhood, and no attention has been paid to such vital quesions as: Who should make the decisions regarding the operation and regulation of such programs and procedures? Should they be regulated? If so, what sort of regulation should be provided? What standards and safeguards should be enacted?

[3] *Family Law (Amendment) Bill* 1980.

Should records be kept? If so, by whom? For how long? What records? Who shall have access? Should there be regulations and criteria with respect to the selection of sperm donors? And of prospective parents? What safeguards should be introduced with respect to the children? Their access to information? Should they be told?

New South Wales was the first State to respond in a thoughtful and sensitive way to seek some of the answers to the above questions. An Advisory Committee on Artificial Insemination has been established which will examine these issues, their social impact, and their implication for social policy and families, family members and family structures. The Committee has membership from three different perspectives (legal, social/welfare, and health) and consequently would appear to have the capacity both

- to respond effectively and with sensitivity to the needs of the individuals involved, and
- to recommend appropriate action with respect to legislation, regulation, services, standards and keeping of records.

In Victoria a Committee to consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization has also been established, and has provided an Interim Report to the Government[4]. Its terms of reference confine the committee to IVF, except insofar as donor material is used as part of the IVF procedure.

It is interesting to compare the response to date of State governments on these issues with the recent report of an inter-church committee in the United Kingdom. This report has suggested that there may be no problems of real significance with respect to IVF children, where the child is the biological child of both the husband and wife. Serious concern was expressed, however, with regard to AID and its procedures, and the recommendation was made that greater community debate should take place with respect to AID, its procedures and effects.

We might well ask the question: Is the legislation so far proposed by the Commonwealth and States adequate to meet the needs of AID children and other parties involved in, or affected by donor-assisted conceptions of them? What other steps should the States take, given that they have responsibility in this area? Are there other more effective ways of enabling the law to meet the needs and protect the rights of AID children and their families?

[4]The recommendations of the Interim Report were restricted to IVF programs where the child conceived is the biological child of both the husband and the wife.

Conclusion

This paper has sought to do two things: first, to describe changes which have occurred in families and family structures over the past 25 years; and secondly, to examine ways in which, over this period, the law has changed in response to the changing needs of families and family members.

In some areas, I have indicated that the law has been able to respond quickly, effectively and sensitively to changing families and their needs.

In other areas, I suggest that the law and practice have been slow to respond, and that all of us with an interest in these areas may need to be more vigilant in working to ensure that, when appropriate, the law responds more effectively, more sensitively and more speedily to the changing needs of families and family members.

As with all *Discussion Papers* in this series, the views expressed in this paper do not necessarily represent any official position on the part of the Institute. The papers are published to stimulate thought and discussion about matters affecting the well-being of families in Australia.

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